Central Law Journal.

ESTABLISHED JANUARY, [illegible]

VOL. 36 ST. LOUIS, MO., JANUARY 6, No. 1

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.
Published by

Central Law Journal Company,

919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.
Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

Entered at the post-office, St. Louis, Mo., as second-class matter.

CONTENTS.

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ST. LOUIS, MO., JANUARY 6, 1893.

With this issue the CENTRAL LAW JOURNAL enters upon the twentieth year of its publication, having been begun in January 1874, under the editorial direction of John F. Dillon and Seymour D. Thompson. From a few hundred subscribers to many thousands its growth from year to year has been constant and steady. Started as a local law journal of the Mississippi Valley, it has far outgrown its territorial limits and has become national in scope and character. As a matter of fact it goes to every State and territory and has one or more subscribers in nearly every county seat in the United States. We speak of this not by way of boasting, nor with the intention to excite the editor of a struggling contemporary (at present in the hands of a receiver) upon whom the suggestion of a "circulation" has apparently much the same effect as a red rag before a bull.

We call attention to the above facts in order that our patrons and subscribers may the better understand the purpose and aim of this journal, which, on account of its general circulation, must necessarily be in the direction of general news from the courts. We do not seek to be a local law newspaper for any one State. The news we aim to supply to practitioners is not selected with reference to State lines, but is gathered and published solely with reference to its substantial value and novelty. In other words, our desire is to give practitioners everywhere in the United States, to know what is going on in all the courts of last resort, to call their attention to what is new, novel, or interesting in the line of legal decisions and in short, to enable them in the hurry of business, to keep well abreast of the times. This has been and will continue to be our earnest endeavor, in the hope that as a newspaper, the JOURNAL will be fresh, varied and interesting; and as a book, a repository of valuable essays on practical questions arising in the administration of justice.

The publishers of the *Railway & Corporation Law Journal*, of New York, announce that with the issue of Dec. 31, which completes the twelfth volume, its publication will stop. The reason given is that the number of its subscribers is too small. "Four hundred subscribers," its valedictory reads, "won't run a law journal at a profit; and the publishers are tired; and the editor is tired, and the printers are tired, and we are all going to take a rest. *Valeti.*"

It will probably surprise some of our contemporaries who, upon a plane of "high literary art" look down upon worldly laborers below, that a law newspaper should cease publication simply because it has failed to obtain subscribers enough to pay its expenses.

In a late issue—No. 24, Vol. 35—we called attention to the recent decision by the Supreme Court of Georgia, of Chapman v. Western Union Telegraph Co., wherein they declare, as the law of that State, that telegraph companies are not liable for damages on account of mental pain and suffering in the failure to deliver telegrams announcing illness and death. A correspondent has since called our attention to a coincidence in connection with that case, which we noted at the time it first came to us. The coincidence consists in the fact that a recent Kentucky case bears exactly the same name, presents identically the same legal question but with a different result. There is only one difference observable between the facts of the two cases. In the Kentucky case the message sent was a notification of the illness and death of the father while in the Georgia case the sick man was a brother of the man to whom the message was sent, the latter being the plaintiff in the suit. The Kentucky court sustains the allowance of damages for mental suffering while the Georgia court denies the existence of any general rule allowing such damages. The *Harvard Law Review* says of the Georgia decision:

"In view of the progress that has been made in recent years in clarifying the subject of damages for mental suffering and extending their scope, it is a disappointment to find the latest case losing sight of fundamental distinctions which seemed to be at last clearly established. The plaintiff in this Georgia

case is the sendee of a telegram which informed him of the desperate illness of his brother, and requested him to come. The message was delayed, in consequence of which the brother died before the plaintiff's arrival, and this action is for the statutory penalty plus damages for mental suffering. To so much of the petition as relates to damages for mental suffering the defendant demurs, and the supreme court holds that the demurrer was rightly sustained—properly enough, since in Georgia failure to deliver a telegram is not in itself, apart from the statutory penalty, a cause of action for the sendee; and mere suffering, whether mental, physical, or pecuniary, gives no right to recompense unless some right is infringed.

But the court is not satisfied merely to decide the case. They go on to deny the existence of any general rule allowing damages for mental suffering. They explain the cases where such damages were allowed by the old law, such as assault and false imprisonment without contact, on the ground that the offense in these cases is wilful, and the damages punitive. They then cite cases denying the right to recover for mental suffering in cases much like the one at bar. Undoubtedly the old law would have precluded damages for mental sufferings in such a case, even if there had been a right of action—as there would have been if the plaintiff and sufferer had been the sendor. If they had followed this older rule with a clear understanding of the ground on which the rule that is now so widely adopted rests, we could find fault only with their judgment."

NOTES OF RECENT DECISIONS.

CONTRACT—WAGERING—ADVERTISEMENT—INSURANCE AGAINST DISEASE. — The recent English case of Cahill v. Carbolic Smoke Ball Company, in the Queen's Bench Division of the English Court of Appeals presents a somewhat new and interesting question. In that case the defendants, the proprietors of a certain medical preparation called "The Carbolic Smoke Ball" issued an advertisement in which they promised to pay £100 to any person who contracted the influenza after having used one of their smoke balls in a certain specified manner and for a certain specified period. The plaintiff upon the faith of the advertisement purchased one of the defendant's smoke balls and used it in the manner and for the period specified but nevertheless contracted the influenza. It was held that the above facts established a contract by the defendants to pay the plaintiff £100 in the event which happened; that such contract was neither a contract by way of wagering within 8 and 9 Victoria, 109, nor a policy within 14 George III ch. 48, section 2 and that the plaintiff was entitled to recover. Upon the question as to the existence of a contract in the case, Hawkins, J., says:

As regards the first question, I am of opinion that the offer or proposal in the advertisement, coupled with the performance by the plaintiff of the condition, created a contract on the part of the defendants to pay the £100 upon the happening of the event mentioned in the proposal. It seems to me that the contract may be thus described. In consideration that the plaintiff would use the carbolic smoke ball three times daily for two weeks, according to printed directions supplied with the ball, the defendants would pay to her £100 if, after having used the ball, she contracted the epidemic known as influenza.

The advertisement inserted in the Pall Mall Gazette in large type was undoubtedly so inserted in the hope that it would be read by all who read that journal, and the announcement that £1000 had been deposited with the Alliance Bank could only have been inserted with the object of leading those who read it to believe that the defendants were serious in their proposal and would fulfill their promise in the event mentioned; their own words, "showing our sincerity in the matter," state as much. It may be, that of the many readers of the advertisement, very few of the sensible ones would have entertained expectations that in the event of the smoke ball failing to act as a preventive against the disease the defendants had any intention to fulfill their attractive and alluring promise; but it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it, that to those who shall not find it as surely efficacious as it is represented by him to be, he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise.

I notice that in the present case the promise is of £100 reward, but the substance of the offer is to pay the named sum of compensation for the failure of the article to produce the guaranteed effect of the two week's daily use as directed. Such daily use was sufficient legal consideration to support the promise. In Williams v. Carwardine (1833), 4 B. & Ad. 621, the defendant, on April 25, 1833, published a handbill, stating that whoever would give such information, as should lead to the discovery of the murderer of Walter Carwardine should, on conviction, receive a reward of £20. In August, 1831, the plaintiff gave information which led to the conviction of one Williams. The court, consisting of Lord Denman, C. J.

Littledale, Parke and Patteson JJ., held that the plaintiff was entitled to recover the £20 upon the ground that the advertisement amounted to a general promise or contract to pay the offered reward to any person who performed the condition mentioned in it, namely, who gave the information. If authority was wanted to confirm the view I have taken, it is furnished by the case I have just cited.

CONSTITUTIONAL LAW — SPECIAL LEGISLATION—PAYMENT OF WAGES BY EMPLOYER—LIMITING RIGHT OF CONTRACT—COAL MINING. —Two courts have very recently passed upon the modern question as to the validity of special legislation limiting the right of contract between employer and employee and requiring payments of wages in lawful money;—the Supreme Court of Missouri in State v. Loomis, 20 S. W. Rep. 332, and the Supreme Court of West Virginia in Peel Splint Coal Co. v. State, 15 S. E. Rep. 1000. In the Missouri case, Rev. Stat. 1889, § 7058, provides that it shall not be lawful for any corporation, person, or firm engaged in manufacturing or mining to issue for the payment of wages any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value, in cash, or in goods, at the option of the holder, at the store or other place of business of the corporation or firm: It was held that this was not such class legislation as infringed upon the constitutional right of all to equal protection of the laws, all persons subject to the legislation being treated alike under like circumstances and conditions.

Such a statute is not an attempt by the legislature to limit the right of contract, but simply to prescribe its form in certain contingencies.

Such statute does not violate Bill of Rights, § 4, declaring "that all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that, when government does not confer this security, it fails of its chief design."

Where the evidence showed that defendants issued to an employee a coupon check book for $5 in payment of wages, which stated that the book was good for merchandise at defendant's store when presented by the employee, and it appeared that the amount of the coupons was deducted from the employee's wages, and charged to him, the evidence was sufficient to prove a violation of the statute.

Thomas, J., for the court filed an exhaustive and interesting review of the authorities.

In the West Virginia case it appeared that in March 1891, the legislature passed an act prohibiting any corporation, company, firm, or person engaged in any trade or business, either directly or indirectly, to issue, sell, give or deliver, to any person employed by such corporation, company, firm, or person, in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check, or other evidence of indebtedness payable or redeemable otherwise than in lawful money; and, if any such scrip, token, draft, check, or other evidence of indebtedness be so issued, sold, given, or delivered to such laborer, it shall be construed, taken, and held in all courts and places to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm, or person issuing, selling, giving, or delivering the same to the person named therein or to the holder thereof; and providing, further, that a violation of this section on the part of such corporation, etc., shall be a misdemeanor, punishable by fine and imprisonment. About the same date the legislature passed another act for weighing and measuring coal at the place where mined, before the same is screened, which provided that all coal mined and paid for by weight shall be weighed in the car in which it is removed from the mine, before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on by such owner or operator and the miners who mined the same; and coal mined and paid for by measure shall be paid for according to the number of bushels marked upon each car in which it is removed from the mine, and before it is screened, and the price paid for each bushel so ascertained shall be such as may be agreed on as aforesaid; and provided, further, that a violation of the act by any corporation, etc., should be a misdemeanor punishable by fine and imprisonment. It was held that neither of these acts is in violation of the constitution of this State, nor of that of the United States, but that both acts, when applied to the facts of

this case, are within the scope of legislative authority.

English and Brannon, JJ., dissented from the conclusion of the court.

CONSTITUTIONAL LAW—ORDINANCE—POLICE REGULATIONS — LAUNDRY BUSINESS.—An interesting question of constitutional law is involved in the decision of *Ex parte* Sing Lee, by the Supreme Court of California. Section one of a certain ordinance of the town of Chico provides that no person can carry on a laundry business in such town, except in certain blocks therein named, without obtaining a written permit from the board of trustees. Section 2 provides that the board of trustees shall grant no permit unless the person applying shall have obtained the written consent of a majority of the real property owners within the block wherein it is proposed to carry on such laundry business, and also of the four blocks immediately surrounding such block. It was held that, such provisions were not police regulations, within Const. art. 11, § 11, providing that "any county, city, town, or township may make and enforce within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws," and were unconstitutional. De Haven, J., says.

The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity; and no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits, as is attempted in the ordinance under review. A town or city may, when deemed necessary for the public health or safety, adopt reasonable regulations as to the manner in which such a business shall be conducted, and for this purpose may, in the exercise of its police power, impose reasonable restrictions as to the kind of building which may be used for such purposes, as, for instance, that it shall be of brick or stone in large and closely-built cities, and that it shall have sufficient drainage, and may prescribe within reasonable limits the hours during which the work of the laundry shall be suspended. *Ex parte* Moynier, 65 Cal. 36, 2 Pac. Rep. 728; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730. Regulations such as these were held in the cases above cited to be merely police regulations, which any municipality possessed of the ordinary powers of such corporations may exercise with a view to promote the health and safety of the community. But the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends, but they commit the right to carry on such business at all, in all but two blocks of the town, to the unrestricted will and caprice of a majority of the real property owners within the block within which it is proposed to establish such laundry, and of the four blocks immediately surrounding such block. Such a condition imposed upon the right of a person to maintain a public laundry is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the disguise of a police regulation. *In re* Jacobs, 98 N. Y. 98. In the case of Yick Wo v. Hopkins, 118 U. S. 373, 6 Sup. Ct. Rep. 1064, the Supreme Court of the United States had before it the question of the validity of an ordinance of the city and county of San Francisco, which made it unlawful for any person to "carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." This provision of the ordinance was in that case held void, as conferring upon the municipal authorities an arbitrary power to give or withhold consent to the carrying on of such business in buildings not made of brick or stone. In passing upon that question, the court, speaking by Mr. Justice Matthews, said: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptationof the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom this consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living."

The ordinance now before us is not less illegal and arbitrary in its provisions, as it makes the right of the trustees to grant permission to carry on a laundry outside of the two blocks dependent entirely upon the consent of a certain number of property owners who are not accountable to any one for their action, and who are not required to give or have any other reason for their refusal to give such consent than their mere will. It is very clear to us that the right of an owner to use his property in the prosecution of a lawful business, and one that is recognized as necessary in all civilized communities, cannot be thus made to rest upon the caprice of a majority or any number of those owning property surrounding that which he desires to use. An ordinance in all respects similar to this was held unconstitutional in the Laundry Ordinance Case, 7 Sawy. 528, 13 Fed. Rep. 229, and it was there said by the court: "In the business of a laundry there is nothing objectionable that may not be urged against all occupations in the city and county. If, therefore,

the supervisors can make its prosecution depend upon the approval of others in its neighborhood, they may acquire a similar approval for the prosecution of other business equally inoffensive. . . . Such a restriction upon the freedom of the pursuit of a lawful occupation is not authorized by any power vested in the board of supervisors, and it may be doubted whether it could be authorized by any legislative body under our form of government." There is a wide distinction between the ordinance in this case and that which was upheld by this court in *Ex parte* Christensen, 85 Cal. 213, 24 Pac. Rep. 747. This ordinance deals with an occupation which is harmless in itself and useful to the community, while the other was sustained as a police regulation of a business in which the citizen has no inherent right to engage, but which may be prohibited altogether, or only permitted under such conditions and restrictions as will, in the judgment of the lawmaking power, limit to the utmost the evils which often attend it. Petitioner discharged.

STATUTES REGULATING FOREIGN CORPORATIONS—RETALIATORY LAWS.

1. *Power to Regulate Foreign Companies.*—A more or less developed and perfected code of regulations, for the government of foreign corporations, exists in most, if not all, of the States. For the foreign company, being the mere creature of the law, has no legal existence beyond the jurisdiction of the sovereignty by which it was created. The recognition of its corporate capacity and legal existence which is usually extended to it, is purely a matter of comity, which it is within the discretion of the local sovereign to grant or withhold, as its policy may dictate.[1] It follows that the foreign company has no right to come into the State to do business, and if it accepts the privilege of doing so, it must take that privilege subject to such conditions and restrictions as the State may see fit to impose.[2]

It is proposed in this article to consider but a single class of regulating statutes. In a number of the States, the idea that the comity due from one State to another is not required to be more than equal and reciprocal has found expression in so-colled "retaliatory laws," having, as an incidental and ultimate purpose, the better protection of domestic corporations in their transaction of affairs abroad. In these statutes the State, in admitting foreign companies to do business within its borders, measures its exactions by the taxes, license fees, etc., imposed upon its own companies in the domicile of the foreign corporation.

2. *Retaliatory Laws not Unconstitutional as Delegating Legislative Power.*—Such laws have been vigorously attacked upon constitutional grounds. It is claimed that in effect they authorize the legislature of the corporate domicile, speaking through its own statutes, which are the subject of extrinsic proof and not of judicial knowledge in the local courts, to fix by law, the specific terms upon which the foreign company may do business in the State; that, if the law-making power of the foreign State modify, repeal or amend its laws, *ipso facto*, such legislation modifies, amends or repeals the legal operation of the local laws.[3] If such a statute is indeed a delegation of legislative powers, it is too plain for argument that it is invalid. But the better view on principle, and it is supported by the weight of authority, is that the operation of such a law is made to depend upon a future contingency; that the provision is the law only of the State enacting it; and that the mere fact that the contingency is created by the legislative action of the foreign State, and that the State officers are referred to the laws of that State to determine whether the contingency has happened, cannot affect its validity.[4]

[1] Bank of Augusta v. Earle, 13 Pet. 584; Runyan v. Coster, 14 Pet. 129; Miller v. Ewer, 27 Me. 509, 56 Am. Dec. 619; Calcutta Jute Co. v. Nicholson, L. R. 1 Exch. Div. 428; Adams v. Railroad Co., 6 H. & N. 404; Ohio L. Ins. Co. v. Merchants, etc. Co., 11 Humph, 1, 53 Am. Dec. 842; Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

[2] Runyan v. Coster, 14 Pet. 129; Williams v. Creswell, 51 Miss. 817; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343; King v. Nat. M. & E. Co., 4 Mont. 1; Canada So. R. Co. v. Gebhard, 109 U. S. 527, 537; Paul v. Virginia, 8 Wall. 168.

[3] Clark v. Mobile, 67 Ala. 217, 10 Ins. L. J. 357. See to the same effect two anonymous Indiana *nisi prius* cases reported in a note to the above. 10 Ins. L. J. 361. The supreme court of that State, however, took a different view. State v. Ins. Co., 115 Ind. 257, 17 N. E. Rep. 574, 27 Am. & Eng. Corp. Cas. 589.

[4] Phœnix Ins. Co. v. Welch, 29 Kan. 672; People v. Fire Association, 92 N. Y. 311; State v. Ins. Co., 115 Ind. 257, 17 N. E. Rep. 574, 20 Am. & Eng. Corp. Cas. 589; Blackmer v. Royal Ins. Co., 115 Ind. 291, 17 N. E. Rep. 580; Home Ins. Co. v. Swigert, 104 Ill. 653. See also, Haverhill Ins. Co. v. Prescott, 42 N. H. 547. Upon the general point that a valid law may be dependent, in its operation, upon the shifting character of foreign laws, rules and edicts, see State v. Parker, 26 Vt. 357; Bull v. Read, 13 Gratt. 390; Cargo of Brig Aurora v. United States, 7 Cranch, 386; Williams v. Bank of Michigan, 7 Wend. 540; Bank v. Village of Rome, 18 N. Y. 38, distinguishing Barto v. Himrod, 8 N. Y. 483.

3. *Nor as Denying Equal Protection of the Laws.*—There is even less ground for the objection, sometimes made, that such laws violate the provision of the federal constitution, that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[5] Such a contention is manifestly untenable. A corporation is not a "person." It derives its corporate life and existence from the laws of the State of its origin. If of a foreign origin, it can come within the jurisdiction and transact business only by legislative permission, express or implied. When the State does not prohibit, comity implies a consent. But the very act here in question is a prohibition; it prescribes the conditions upon which such organizations may be admitted, to which the latter by coming in must be taken to assent. They have no constitutional right, as a citizen of another State has, to come into the jurisdiction, and cannot dispute the conditions under which alone they have been admitted.[6]

4. *Retaliatory Taxation Laws not Invalid for Want of Uniformity and Equality.*—Such laws imposing taxes cannot be regarded as in conflict with the principle of uniformity and equality in taxation required by the constitutions of many of the States, whether the charge upon the company is to be regarded in the nature of taxation or of a license. The effect of such laws is to classify the foreign companies by the States from which they come, and, even if they are considered as levying a tax, such classification for purposes of taxation being just and fair, there can be no constitutional objection to it.[7]

7. *Not to be Regarded as Taxation at all.*—But the better view is that the burden imposed by these statutes is not to be regarded as a tax at all, but rather in the nature of a license fee.[8] Thus, in New York, it was held that such a law did not come fairly within the terms of a constitutional provision that "any law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object,"[9] and was not invalid as in violation of it.[10] And in Georgia such legislation was held to have no connection with the general tax laws, and not repealed by general laws on the subject of taxation subsequently passed.[11]

6. *When Retaliatory Provision Becomes Operative.*—The contingency contemplated by such statutes arises when the laws of the foreign State provide for imposition of the tax, license fee, etc., and the retaliatory law goes into effect at once. It is not necessary that payment should have been actually exacted from some corporation of the retaliating State, nor even that any of its corporations should be at that time doing business in the foreign State.[12]

7. *Strict Construction — General Rule— When the Effect of the Foreign Statute is Doubtful.*—There can be no doubt that the proper general rule of interpretation of such legislation requires a strict construction, confining its operation to the limits expressed in its terms. Such enactments are in derogation of the general policy and law of comity prevailing in all the States, which allows foreign corporations to engage in business in their respective jurisdictions, and a particular company or class of companies should not, as a mere retaliatory measure, be excluded from doing so by a judgment of ouster, unless it is clearly apparent that the case is within the scope of the retaliatory statute.[13] So, where a New York statute provided that "no company organized under this act" shall, etc., engage in more than one of several kinds of risks specified, and it appeared doubtful what effect would be given to such legislation in that State, the Minnesota court, in a *quo warranto* proceeding,

[5] Const. U. S. art. 14, § 1.

[6] People v. Fire Ass'n, 92 N. Y. 311, 324.

[7] Phœnix Ins. Co. v. Welch, 29 Kan. 672; Home Ins. Co. v. Swigert, 104 Ill. 653; State *ex rel.* v. Insurance Co., 115 Ind. 257, 17 N. E. Rep. 574, 20 Am. & Eng. Corp. Cas. 589. *Contra:* Clark v. Mobile, 62 Ala. 217, 10 Ins. L. J. 357.

[8] Phœnix Ins. Co. v. Welch, 29 Kan. 672.

[9] Const. N. Y. art. 3, § 20.

[10] People v. Fire Ass'n, 92 N. Y. 311, 327.

[11] Goldsmith v. Home Ins. Co., 62 Ga. 379.

[12] Germania Ins. Co. v. Swigert, 138 Ill. 237, 21 N. E. Rep. 530. In so construing the statute in this case the court calls attention to the fact, that no provision is made by its terms whereby the State auditor can inform himself as to whether insurance companies organized under the laws of the State have or have not agencies in any particular foreign State. He cannot leave his office to make inquiries; no provision is made for a messenger; and he is not authorized to rely upon the reports of officers of the foreign State. See also State v. Reinmund, 45 Ohio St. 214, 13 N. E. Rep. 30.

[13] State v. Fidelity, etc. Ins. Co., 39 Minn. 538, 41 N. W. Rep. 108; Griesa v. Massachusetts Ben. Co., 15 N. Y. Supp. 71.

held that, in the absence of judicial construction of the provision by the courts of New York, it would not exclude a New York corporation organized before the enactment of the New York statute in question from doing business in Minnesota, although it might be of the opinion that the probable effect of such legislation was to restrict the operations of foreign corporations in New York to a narrower field than that allowed in Minnesota to the respondent.[14]

8. *In New York—Distinctions between "Obligations" and "Prohibitions."*—The New York retaliatory statute provides that, where any other State shall impose any "obligations" upon corporations of this State doing business in such other State, "the like obligations are hereby imposed on similar corporations of such other States transacting business in this State."[15] Upon a question as to the validity of insurance effected by a Massachusetts assessment company in New York upon the life of a woman sixty-two years of age, it was urged that under the above retaliatory law, the statute of Massachusetts providing that "no corporation doing business under this act shall issue a certificate or policy upon the life of any person more than sixty years of age,"[16] must be considered as in force in New York as to Massachusetts companies. The New York Supreme Court, however, held otherwise upon the theory that the retaliatory statute must be strictly construed, and that in imposing "like obligations" upon foreign companies, the term "obligation" cannot be held to include a prohibition or limitation upon the powers of the corporations referred to.[17]

9. *Duties of State Officers.*—An obvious argument in favor of a strict construction of such statutes is that their precise and ultimate effect cannot be foreseen at the time they are passed. The laws of the foreign jurisdiction, which they declare shall become a part of the State, may not be yet enacted. And if already on the statute book, they may be radically different, in policy and theory, from the rest of the legislation on that subject, of the State by which they are adopted. Thus, in Maryland, where the insurance commissioner has no discretionary power to exclude a foreign company from the State, it was held, under a retalitory law which provided that when under the laws of any other State, any "taxes, fines or penalties, or other obligations or prohibitions are imposed upon insurance companies," incorporated under the law of Maryland, "greater than those imposed by the laws of this State," the same shall be enforced upon "companies of such State doing business in this State, instead of those prescribed by the laws of this State," had the effect to put into operation in Maryland the New York statute, giving the insurance commissioner, or as he is called in that State "the superintendent of insurance," authority to refuse a foreign corporation power to transact the business of insurance in the State, "whenever the capital stock shall be impaired and also whenever in his judgment refusal to admit shall promote the best interests of the people of this State." And under this transplanted statute, the court sustained the discretionary exclusion, by the Maryland commissioner of insurance, of an otherwise unexceptionable New York corporation, it being shown that a similar Maryland company had been arbitrarily excluded from the State of New York by the superintendent of insurance.[18] But in Indiana, where the statute provides for the payment of taxes, etc., by foreign insurance companies to the State auditor,[19] it was held that the retaliatory statute[20] would not put in force the New York law, by which foreign companies are required to pay taxes to the treasurer of the fire department of each city or to the city treasurer, so as to enable such municipal officers in Indiana to maintain

[14] State v. Fidelity, etc. Ins. Co., 39 Minn. 538, 41 N. W. Rep. 108.

[15] Acts N. Y. 1883, ch. 175.

[16] Acts Mass. 1885, ch. 183, § 10.

[17] Griesa v. Massachusetts Ben. Assn. 15 N. Y. Supp. 71. While this is probably a correct interpretation of the New York statute, on principle the power of the Massachusetts company to make a contract in New York, which it was incapacitated to make in Massachusetts, not because of a general rule of property, but because the legislature of that State, which created it, has withheld the power, may well be doubted. Such a statute controlling, limiting, fixing the p f assessment insurance companies generally, both foreign and domestic, within the State, may be well regarded as a part of the charter of the companies organized under the statute, and that it therefore goes with them and limits their action in the foreign jurisdiction.

[18] Talbott v. Fidelity, etc. Co. (74 Md. 536), 22 N. E. Rep. 395. See also State v. Moore, 39 Ohio St. 486.

[19] Acts Ind. 1873, p. 205, § 8.

[20] Rev. St. Ind. 1881. § 3773.

an action for such tax is against a New York corporation doing business in that State.[21]

10. "*Taxes, Fines, Penalties, Deposits, Statements, Obligations and Requirements.*"—In a case arising under the New Hampshire statute which provided for the imposition of "the same taxes, fines, penalties, deposits, statements, obligations and requirements"[22] upon a foreign mutual insurance company as are imposed, in the State of its domicile, upon New Hampshire corporations, it was held that a Massachusetts statute, which provided that no foreign insurance company shall make a contract of insurance in that State until it had complied with the provisions of that act,[23] was thereby put into effect in New Hampshire, and that a contract of insurance made in that State by a Massachusetts mutual insurance company which had not complied in New Hampshire with the terms of the Massachusetts law was invalid.[24]

11. "*Same Obligations or Prohibitions.*"—The retaliatory section of the Ohio statute, which applies to insurance companies generally, provides that when, by the laws of another State, "any taxes, fines, penalties, license, deposits of money or of securities or other obligations or prohibitions" are imposed on Ohio insurance companies doing business there, "the same obligations or prohibitions of whatever kind" shall be imposed upon all insurance companies of that State doing business in Ohio.[25] This act was held to be for the purpose of protecting insurance companies from impositions rather than retaliatory, in the sense of first imposing upon foreign companies such taxes as are imposed upon other foreign corporations under like circumstances, and then, in addition, a sum equal to what other States may imposse upon Ohio companies doing business there. As a consequence, a peremptory writ of *mandamus* was granted to compel the superintendent of insurance to accept a sum which, in addition to the amount paid as taxes in the several counties, was sufficient to make the total equal to the amount that would be realized were the rule of taxation of the State of the corporate origin applied to the company's business in Ohio.[26]

12. *When the Foreign Restrictions Coincide with Charter Limitations.*—The Iowa court, in enforcing, under the retaliatory provision of the Iowa Code,[27] the statute of New York, which precludes foreign insurance companies from making, in New York more than one of certain kinds of insurance held that the fact that Iowa companies, by Iowa laws, are prohibited from making more than one kind of insurance in Iowa,[28] and hence, that the New York law does not deny them any right which they would have at home, is immaterial; that if New York imposes any prohibitions, the same prohibitions must be imposed in Iowa as against New York companies.[29] It may be noted in this connection that it is extremely doubtful whether the Iowa companies would not be precluded by the above mentioned provision of the Iowa Code from engaging in more than one kind of insurance in New York, irrespective of the New York law on that subject. The enactment in question is that "No company shall be organized to issue policies of insurance for more than one of the above five mentioned purposes, and no company that shall have been organized for either one of said purposes shall issue policies of insurance for any other."[30] Such a provision may fairly be regarded as a part of the charter of each company, and imposes a restriction which will accompany it into the New York jurisdiction.[31] If this view is right, and it is in accordance with every principle, it results that the New York statute withholds from the Iowa corporations only a privilege

[21] Blackmer v. Royal Ins. Co., 115 Ind. 291, 17 N. E. Rep. 580.

[22] Comp. St. N. H., p. 371, ch. 154, §§ 4, 5, and 6.

[23] Laws Mass. 1854, p. 773, ch. 331, § 1.

[24] Haverhill Ins. Co. v. Prescott, 42 N. H. 547; Compare State v. Western Union Mut. L. & Acc. Soc., 47 Ohio St. 167, 24 N. E. Rep. 392; State v. Moore, 38 Ohio St. 7.

[25] Rev. St. Ohio, § 282.

[26] State v. Reinmund, 45 Ohio St. 214, 13 N. E. Rep. 30.

[27] Code Iowa, § 1154.

[28] Code Iowa, § 1695.

[29] State v. Fidelity, etc. Co., 77 Iowa, 648, 42 N. W. Rep. 509.

[30] Code Iowa, § 1695.

[31] Compare State v. Western Union Mut. L. & Acc. Soc., 47 Ohio St. 167, 24 N. E. Rep. 392. But see Griesa v. Massachusetts Ben. Ass'n, 15 N. Y. Supp. 72, where the New York Supreme Court held that the restriction imposed by a Massachusetts statute upon all companies, domestic and foreign, "doing business under this act," from issuing a policy upon the life of any person over sixty years of age (Acts Mass. 1885, ch. 183, § 10), will not follow a Massachusetts company into New York, and invalidate a contract made there. On principal this decision is of doubtful authority.

which they cannot accept, and the decision of the Iowa court enforces, by way of retaliation, a law which could have no application to Iowa corporations, the protection of whose interest the Iowa legislature must be held to have had in view.

WM. L. MURFREE, JR.

CORPORATIONS — PURCHASE OF STOCK OF ANOTHER COMPANY—ULTRA VIRES.

BUCKEYE MARBLE ETC., CO. V. HARVEY.

Supreme Court of Tennessee, Oct. 31, 1892.

1. Where a corporation is without power, specially granted or necessarily implied, in its charter, to acquire or deal in corporate stock, a purchase by it of the stock of another company, for the purpose of controlling its operation, is *ultra vires* and void.

2. In a proceeding in equity, by such corporation against the vendor of the stock, because of his failure to fulfill the terms of the sale by the payment of certain debts, although he has received the stipulated consideration, the court will not affirm the unlawful contract, by sustaining the bill; and the defendant is not estopped to set up the invalidity of the contract.

LURTON, J.: The complainant is an Ohio corporation, and was organized, under the general incorporation law of that State, "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carrying on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issues of shares made by a Tennessee corporation engaged in a similar business, and under a similar charter, and known as the McMillan Marble Company. Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned at the time of the sale 25 shares, being one half of the entire stock of the company. These shares he conveyed to a trustee selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of $6,000, the defendant assuming and agreeing to personally pay and discharge one half of all liability which might be fixed upon the McMillan Marble Company as a result of certain suits against that company then pending in the courts of this State. The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillan Marble Company, to pay out about the sum of $3,000 in the settlement and satisfaction of the claims in suit at time of its contract with defendant. The relief sought is a decree against defendant for one half this sum, being the proportion he agreed to pay under the agreement of sale. The defense is that the contract of sale to the complainant company was unlawful and void. —that is to say, that the purchase of these shares was outside the object of its creation, as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void, and of no legal effect; that it is not a case of excessive use of power granted, but that no power whatever was conferred to deal in or hold the shares of another corporation; that the suit is one upon a void contract, and in furtherance of it, and it should not be entertained by a court of law and equity.

"The rule in the United States is," says Mr. Green, the American editor of Brice's Ultra Vires, "that a corporation cannot become a stockholder in another corporation unless by power specially granted by its charter or necessarily implied in it." Green's Brice, Ultra Vires, 91, note *b*, and American cases cited. "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management, nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its proper business. A corporation must carry on its business by its own agents, and not through the agency of another corporation. It is clear, also, that a corporation has no implied right to speculate in shares, unless this be the kind of business for which the company was founded." 1 Mor. Priv. Corp. § 431. The evidence shows that the declared purpose of complainant in buying in the shares held by the defendant was to enable it to manage and control the business of the Tennessee company in the interest of the Ohio company. There is no pretense that it had any express power to purchase shares in another company, and it is too clear to need argument or further citation of authority that it had no implied authority to purchase and hold shares, either in its own name or in that of a trustee, for the purpose of controlling another corporation. That these corporations were engaged in a similar business does not help the case. The purpose and intent in granting a charter is that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this State will not permit the control of one corporation by another. Especially is this true when a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by another in a like business is unlawful, as tending to monoply. The result is that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and therefore unlawful and void. Being void, it was of no legal effect, and no rights result from it, enforceable by or through the courts of this State, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the

able and learned counsel for complainant that, when the contract had been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding onto the price he has received. There are cases where, the contract being fully executed on both sides, the court, in the interest of justice, has refused to aid either in obtaining a rescission. Arms Co. v. Barlow, 63 N. Y. 62, is one of this class. So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the mode of executing the contract or in the power of the agent. So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefit received. Green's Brice, Ultra Vires, 717, and note at end of chapter. Again, there are cases where the courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the courts have held that the defect in the power could not be set up in a collateral way, and that the State only could complain of such violation. To this effect were our own cases of Barrow v. Turnpike Co., 9 Humph. 303, and Heiskell v. Lodge, 87 Tenn. 668, 11 S. W. Rep. 825. The question here is not like any of these. The complainant sues upon its contract, and in affirmance of it seeks to have the defendant perform an agreement which sprung from and was collateral to it. It has received the shares it purchased, and holds onto them. It simply asks that the defendant be further compelled to perform its contract, by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillan Marble Company. The suit is clearly in furtherance of the original unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful, or entitle it to an enforcement of it. This proposition was very plainly put in Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., where it was stated, as a result of all the previous discussions of that court upon this subject, that "a contract made by a corporation, which is unlawful and void, because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S. 389, 9 Sup. Ct. Rep. 770. The case of Central Transp. Co. v. Pullman's Palace Car Co., is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff. In that case the Central Transportation Company had leased and transferred all its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum $264,000 for a term of 99 years. Possession was taken, and the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained. The court held that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this, that even if the contract was void, because *ultra vires* and against public policy, yet that having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by its duration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period. After reviewing its own decision on this branch of the case, the court said: "The view which the court has taken of the question presented by this branch of the case, and the only view which appears to be consistent with legal principles, is as follows: "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisite to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing law, neither the corporation, nor the other party to the contract, can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws. * * * A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back or compensation made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an im-

plied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." 139 U. S. 60, 11 Sup. Ct. Rep. 478. This seems to us to fully and clearly state the rule. The passage cited by counsel from Railway Co. v. McCarthy, 96 U. S. 267, "that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong," is misleading, and, if literally construed, would result in an erroneous practical extension of the powers of corporations. We do not understand that a result required by adherance to the law would be either unjust or a legal wrong. The learned judge doubtless intended to be understood that the defense would be a legal wrong only when the law did not require its consideration by the court. This passage, and one of similar character in San Antonio v. Mehaffy, 96 U. S. 312, was uncalled for in the case in which it was used, and in Central Transp. Co. v. Pullman's Palace Car Co., *supra*, characterized as a mere passing remark. To sustain the suit as now presented would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance. Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record. The decree of dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.

NOTE. — The general rule, is as established by adjudicated cases, is, undoubtedly, as stated in the principal case, that a corporation has no implied power to become a stockholder in another company. The rule, has, perhaps, been most frequently enforced in the case of railroad companies. Central R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah, etc. R. Co., 43 Ga. 13; Elkins v. Camden, etc. R. Co., 36 N. J. Eq. 5; Salomons v. Laing, 12 Beav. 239, 253; Great Northern Ry. Co. v. Eastern Counties Ry. Co., 21 L. J., Ch. 837; Maunsel v. Midland etc., Ry. Co., 1 Hem. & M. 130; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Pearson v. Concord R. Corp., 62 N. H. 537; Mackintosh v. Flint, etc. R. Co., 34 Fed. Rep. 582. But it is by no means confined to such companies. Franklin County v. Lewiston Bank, 68 Me. 43; Mut. Sav. Bank v. Meriden Agency Co., 24 Conn. 159; Berry v. Yates, 24 Barb. 199; Talmage v. Pell, 7 N. Y. 348; Sumner v. Marcy, 3 Woodb. & M. 105; First National Bank v. Nat. Exchange Bank, 92 U. S. 122. *Contra:* Booth v. Robinson, 55 Md. 419; Parker v. Bernal, 66 Cal. 112; Hodges v. New England Screw Co., 1 R. I. 312, 328.

As will be seen from the cases cited, banks are certainly included in the rule and have no power, as such to invest in, or purchase the stock of another corporation, whether a bank or engaged in another business. But there seems to be some difference of opinion as to the power of a bank to accept corporate stock in another corporation as collateral security for a loan made by the bank at the time of the pledge. Without doubt, it is the universal custom of bankers to engage in such operations. And the validity of such a transaction is sustained by two well considered English Chancery cases. Royal Bank of India's Case, L. R. 4 Ch. 262; *Re* Barnard's Banking Co., L. R., 3 Ch. 105. But in estimating the weight of such authority, account must be taken of the fact that the tendency of the English cases generally, is in favor of the power of one company to become a shareholder in another, and of the legislative recognition of the doctrine in statutes based on the assumption that corporations may lawfully exercise such a power. Lindley on Companies, 5th ed. 43. Of the American cases, not one can be said to squarely support the power of the bank to accept such a pledge. Among the earlier cases was Shoemaker v. National Mechanic's Bank, 1 Hughes, 101, where the court, acting avowedly upon the principle that an injunction will not be granted in a doubtful case, refused to restrain a national bank from making loans on the negotiable notes of persons or firms, secured by corporate stock of marketable value as collateral. In Baldwin v. Canfield 26 Minn. 43, 60, the validity of a loan by a national bank upon shares of stock as collateral security, is sustained, but no question appears to have been raised as to the power of the bank as a corporation to deal in incorporate stock. The question made and which the court decided adversely, was as to the power of the bank, as a national bank to lend money on the stock of a company whose assets consisted solely of real estate, the point being that such a loan was "upon mortgage security" within the prohibition of the national banking act. Sistare v. Best, 88 N. Y. 527, was a controversy between a bank and its broker whom it had employed to sell stock, the legal title to which was vested in it by a pledge which was *ultra vires* under the particular terms of its charter. The court held that the question of the validity of the pledge, whether it was void or voidable, was not in issue and declined to pass upon it. By far the strongest American case, supporting the power, is National Bank v. Case, 99 U. S. 628, where the Supreme Court of the United States held a national bank, which was the pledgee of shares in another national bank, liable as a stockholder for the corporate debts of the latter upon the insolvency of the latter. But even this case is not conclusive. For the court puts its decision rather upon the ground of estoppel, saying that nothing in the letter or spirit of of the national banking act prohibits such a loan, and if it were prohibited the lender could not set up its own violation of law to escape the responsibility resulting from its illegal actions. The only American case that we have seen, in which the question comes squarely up for decision, is Franklin Bank v. Commercial Bank, 36 Ohio St. 350, in which the Ohio court not only held such a pledge invalid because prohibited by the terms of the particular charter but declared that, in the absence of a specific grant in the charter, no such power could exist; and it declined in that case to hold the company, whose stock was so pledged, liable for refusing to transfer the claims to the name of the pledgee bank on its books.

There can be no doubt however that a bank may accept a transfer of corporate stock as security for, or in satisfaction of a pre-existing debt. First National Bank v. National Exchange Bank, 92 U. S. 122, 128. See also, Fleckner v. Bank (U. S.), 8 Wheat. 351.

Another class of exceptions would seem to be religious, charitable and literary corporations not organized for profit, which, it has been said, may rightfully invest their monies in the stock of other corpo-

rations. "The power, if not expressly mentioned in their charters, is necessarily implied for the preservation of the funds with which they are endowed." See *dictum* in Pearson v. Railroad, 62 N. H. 549.

CORRESPONDENCE.

APPLICABILITY OF EXEMPTION LAWS TO THE LAW OF LIFE INSURANCE.

To the Editor of the Central Law Journal.

A recent number (No. 20, Vol. 35) of your valuable journal furnishes an able contribution on the "applicability of exemption laws to the law of life insurance," in which, after a critical review of a number of *dicta* and one apparently overruled case, the conclusion reached is that these opinions to the contrary notwithstanding, and in the absence of an assignment of the policy to a trustee or an accountable assignee," the widow's creditors can seize upon her share of a policy upon the life of the deceased husband. In view of the fact that a different conclusion has been reached in two comparatively recent decisions in which the question was directly decided, but which have escaped notice in the article above referred to, I desire to cite them as important factors in the evolution of this branch of the law. In Brown v. Balfour (46 Minn. 68, 48 N. W. Rep. 604), it was held that the widow's share of the policy was protected against her own as well as her deceased husband's creditors under a statute declaring that the beneficiary fund of designated associations to the amount of $5000 shall "be exempt from execution, and shall under no circumstances be liable to be seized . . . to pay any debt of such deceased member." The court cite with approval the other case of Schillinger v. Boes, 85 Ky. 357, 3 S. W. Rep. 427, where, under a similar statute a like conclusion is reached. These two decisions are evidently a departure from the rule of strict construction adopted in other cases, and furnish a striking illustration of that sage observation that opinions will differ while human nature remains imperfect.

LEX.

CAPITAL PUNISHMENT.

To the Editor of the Central Law Journal.

I desire to express my concurrence in the sentiments of Mr. Weems, on the subject of capital punishment, contained in his letter published in your issue of Oct. 28th. Those murders committed, not long ago, in an eastern city, on a day when a man was paying the penalty fixed by law for a like offense, with his life, was only one of many instances that have fully demonstrated that men are not deterred from committing murder by the death penalty. Then why continue a barbarism which does not save life but costs innocent people theirs, sometimes as we know? What more fitting celebration of the closing years of a century that has given so many human beings their freedom than that in those years the law should cease to take human life.

CHARLES A. MURRAY.

BOOK REVIEWS.

BENJAMIN ON SALES.

This, the sixth American edition of what is generally regarded as a master piece of legal literature, is reprinted from the latest English edition. The American law is presented in a continuous note at the end of each chapter. These notes usually treat the subject in the same order and upon the same lines adopted by Mr. Benjamin in the text. The editors state that they have not thought it necessary to cite every reported case upon familiar and well-settled propositions, but upon points unusually delicate or not yet universally assented to they have endeavored to present a full review of the American decisions. The great reputation which Benjamin on Sales has attained in all English speaking countries as an English classic, in legal literature, renders unnecessary any words of commendation from us. It is however, of interest to note that the work of the American editors is of an admirable character and upon the same high plan of excellence as the original efforts of Mr. Benjamin. The value of the work to the American practitioner is thereby very much enhanced. It is difficult to commend the book too highly. As a treatise on the modern law of sales it is unexcelled. It is also beautifully printed and bound. Published by Houghton-Mifflin Co., Boston and New York.

THORNTON ON THE LAW OF RAILROAD FENCES AND PRIVATE CROSSINGS.

Here is another specialty treatise, now becoming quite common in the domain of legal literature. The law pertaining to railroad fences and crossings, has now grown to considerable proportions, and we see no reason why a text book upon the subject should not be in order. The author seems to have been industrious in the collection and compilation of authorities and has exercised good judgment in their arrangement. If we were disposed to criticise a work which possesses in most regards considerable merit, it would be in the making of lengthy quotations from the opinion of courts, which though in one sense of value, is objectionable as expanding the volume beyond the necessary limits of a text book. As a rule, however, the subjects of the text are well presented, and the citation of authorities numerous. We have no doubt that the work will be of value,especially to those interested in railroad company litigation, and the many questions bearing on the subject of the killing of stock, and the duties to fence, etc. The volume has nearly six hundred pages, and is exceedingly well printed. It is published by the Bowen-Merrill Company, Indianapolis.

HUMORS OF THE LAW.

"And now, gentlemen of the jury," wound up the lawyer, "and now can you with easy consciences refuse to bring in a verdict for this young woman? Think of her, with her husband killed by this railway corporation, and contemplate her situation, left alone, a widow, at the tender age of twenty-seven! Think—"

But he was interrupted by the poor young widow, who raised her eyes, and in a voice choking with tears sobbed: "Not twenty-seven, please but twenty-five!"—*Green Bag.*

Uncle Mose—"Jedge, yoah honah, I falls back on mah previous good rep'tation. Hab yo' ebber seed me up befo' de coht befo'?" Justice Clover—"Never, Mose." Uncle Mose—"No, sah; nebber; I takes pains to keep a'way from such disrep'table places, sah. An' yet, sah, heah yo's gwine to take agin me de word of a shif'less lawyer who's been hauntin' de cohts al hees life."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION—Survival—Assignability.—A personal tort which does not survive to the personal representatives does not pass by assignment.—SLAUSON V. SCHWABACHER, Wash., 31 Pac. Rep. 329.

2. ADMIRALTY PLEADING—Departure.—Under a libel *in rem* on a contract of affreightment to recover for cargo destroyed in extinguishing a fire, libelant may be allowed to shift his claim to a demand for a general average, when the facts alleged in the libel and answer are sufficient, taken together, to sustain the same.—THE RAPID TRANSIT, U. S. D. C. (Wash.), 52 Fed. Rep. 320.

3. ADVERSE POSSESSION—Claim of Title.—Possession of land under an executory contract to convey, followed by performance and continued possession for 10 years under the deed, is sufficient to establish adverse possession against any one claiming under the vendor, notwithstanding Rev. St. 4211, requires the claim of title for that purpose to be exclusive of any other right, and founded on some written instrument, as being a conveyance.—SIMPSON V. SNECLODE, Wis., 53 N. W. Rep. 499.

4. ANIMALS—Killing Trespassing Dog.—One is not justified in killing a valuable dog, without notice to the owner, merely because the dog barks around his house at night, or chances on one occasion to have left some tracks on a freshly painted porch, or to have been detected in the henhouse, but not, however, doing any mischief.—BOWERS V. HORAN, Mich., 53 N. W. Rep. 535.

5. APPEAL—Instructions.—Where a defendant, after his motion to direct a verdict in his favor, made at the close of plaintiff's testimony, is overruled, introduces evidence in defense, and neglects to renew the motion at the close of his testimony, he waives the right to raise in the supreme court the question whether there was sufficient evidence for the plaintiff to justify submitting the case to the jury.—CHICAGO CITY RY. CO. V. VAN VLECK, Ill., 32 N. E. Rep. 262.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Insolvent Banks.—The fact that a bank is insolvent, within the knowledge of its officers, and receives the money of a depositor under circumstances which amount to a fraud upon him, is not of itself sufficient to entitle the latter to preference from the funds of the bank in the hands of an assignee. He may follow his money while he can trace and distinguish it, or the proceeds thereof, but not after it has passed into the hands of the assignee mingled with the other funds of the bank.—WILSON V. COBURN, Neb., 53 N. W. Rep. 466.

7. ATTACHMENT — Promissory Note—Discharge.—Plaintiffs had been sureties for defendant upon a promissory note, which, the defendant failing to pay, they paid, and procured to be assigned to them. In this action against the principal maker of the note they caused an attachment to be issued upon the ground that the suit was brought upon an overdue promissory note: Held, the statute was not intended to cover such case, and that the defendant's motion to dissolve the attachment should have been sustained.—FITCH V. HAMMER, Colo., 31 Pac. Rep. 336.

8. ATTACHMENT BOND — Joinder.—The principal and sureties may be joined in an action on an attachment bond which provides that "plaintiff" will pay all costs awarded to defendant, and all damages sustained by him by reason of such attachment, if the court decides that plaintiff was not entitled to the same.—MATTLER V. BRIND, Colo., 31 Pac. Rep. 348.

9. ATTORNEY AND CLIENT—Contingent Fee.—An agreement by a client to pay his attorney a reasonable compensation for his services, to be paid out of the proceeds of a proposed law suit, does not amount to an equitable assignment of an interest in the subject-matter of the litigation, or give the attorney the right to intervene in the suit.—HULL V. CULVER, Ill., 32 N. E. Rep. 265.

10. CARRIERS—Passengers—Damages.—A colored passenger upon a railway train is entitled to the same protection against drunken and violent men seeking to molest, outrage, and humiliate him as a white passenger. This protection must be afforded by the conductor to the tent of all the power with which he is clothed by the company or by the law, and his failure to afford it, when he has acknowledged that there is occasion for his interference, will subject the company to liability in damages.—RICHMOND & D. R. CO. V. JEFFERSON, Ga., 16 S. E. Rep. 69.

11. CARRIERS — Railroad Tickets—Transferability.—A railroad coupon ticket over different roads, issued by one company as principal as to its own lines, and as agent as to the lines of the other roads, not limited to a continuous passage, but made subject to the stop-over regulations of the different roads, and containing no provision against its transfer, but merely purporting to be sold at a reduced rate, is a severable contract, as between the different roads, assignable at the end of any division.—NICHOLS V. SOUTHERN PAC. CO., Oreg., 31 Pac. Rep. 296.

12. CARRIERS OF PASSENGERS—Sleeping Car Company—A sleeping car company is not a common carrier. Its cars are under the control of the railroad company, except as to furnishing lodging to those who may pay for it, and the agents of the railroad company are entitled to determine who shall occupy the sleeping cars, as part of the train.—LEMON V. PULLMAN PALACE CAR CO., U. S. C. C. (Miss.), 52 Fed. Rep. 262.

13. CHATTEL MORTGAGES—Sale of Property by Receiver.—A mortgagee of personal property, although not a party to the suit in which a receiver of the property was appointed, must if he becomes a purchaser of the property at a public sale of it made by the receiver under a judgment or decree, and pays up the amount of his bid, assert his mortgage lien upon the proceeds of the sale in order to have any valid claim against the receiver therefor. If he neglects to assert his claim until after the whole fund has been distributed to other creditors, and the receiver duly discharged, he comes too late, whether the receiver knew of the mortgage or not.—TRAUTWEIN V. MCKINNON, Ga., 16 S. E. Rep. 85.

14. CHATTEL MORTGAGE AND NOTE — Foreclose.—Where a promissory note and mortgage upon personal property are combined together in one instrument, the promise being to pay the money to a named payee

or bearer, and the mortgage portion of the instrument being in these words: "To further secure the payment of this note, I hereby mortgage the following described property," etc.,—one who is not the payee named in the paper cannot foreclose the mortgage in his own name as holder and owner thereof, without having a written assignment of the same.—NICHOLSON v. HARRIS, Ga., 16 S. E. Rep. 84.

15. CONSTITUTIONAL LAW—Registration of Voters.—Act March 9, 1891, requiring the registration of voters who have absented themselves from the State for 6 months or more since last voting, or who have not resided at least 6 months in one county, is void under Const. art. 2, § 12 requiring a residence of 6 months in the State, 60 days in the township, and 30 days in ward or precinct.—BREWER v. MCCELLAND, Ind., 32 N. E. Rep. 299.

16. CONTRACT—Breach—Measure of Damages.—On the breach of a contract giving plaintiff the exclusive sale of certain goods in a specified territory, the measure of damages is the profits plaintiff would have realized had he made the sales constituting the breach.—DR. HARTER MEDICINE CO. v. HOPKINS, Wis., 53 N. W. Rep. 501.

17. CONTRACT — Railroad Companies—Injunction.—A contract by a railroad company to maintain and keep open two existing passage-ways for stock under its road through a certain farm is sufficiently certain to entitle the owner of the farm to an injunction against its violation, although the size, nature, and location of the ways are not stated in the contract.—ROCK ISLAND & P. RY. CO. v. DIMICK, Ill., 32 N. E. Rep. 291.

18. CONTRACT—Rescission.—Where one conveys land in consideration of support for life, and the grantee afterwards refuses to perform his contract, equity will grant relief by rescinding the contract and canceling the deed.—KUSCH v. KUSCH, Ill., 32 N. E. Rep. 267.

19. CONTRACT WITH IRRIGATION COMPANY.—A provision in a contract between a ditch company and the owners of land irrigated by the ditch, that, if the company shall willfully fail or refuse to supply any landowner with the amount of water agreed upon, the landowner shall have the right, on payment or tender thereof, to take the water, is void, because incompatible with the right of control incident to the ownership of the ditch, and against public policy as tending to confusion and a breach of the peace.—FARMERS' HIGHLINE CANAL & RESERVOIR CO. v. WHITE, Colo., 31 Pac. Rep. 345.

20. CONVERSION—Measure of Damages.—Where goods have been converted, and the owner afterwards receives the whole or a portion thereof back, or the proceeds arising from their sale, he does not thereby bar his right of action for the original wrongful taking, but such fact may be shown in mitigation of damages.—WATSON v. COBURN, Neb., 53 N. W. Rep. 477.

21. CORPORATIONS—By-laws.—Where a corporation, not organized for pecuniary profit, provides by by-law that members shall be admitted upon written application, indorsed by two members, and approved by at least seven directors, and payment of an initiation fee or presentation of a certificate of membership duly transferred to the applicant, one to whom a certificate of membership has been duly transferred, but who has made no application for membership, is not a member of the corporation.—AMERICAN LIVE-STOCK COMMISSION CO. v. CHICAGO LIVE-STOCK EXCHANGE, Ill., 32 N. E. Rep. 274.

22. COURTS—Sentence Passed after Abolition.—A sentence imposed after the court pronouncing the same has been abolished by an act of the legislature cannot be allowed to stand.—GORMAN v. PEOPLE, Colo., 31 Pac. Rep. 335.

23. COVENANTS—Warranty.—In an action brought by a vendee of real estate against the vendor to recover damages for alleged breaches of covenants, where it is alleged and shown by the vendor that the vendee has been in the quiet and peaceable possession of the land, enjoying and collecting the rents and profits thereof, ever since the execution of the deed containing the covenants, it is error for the trial court to permit the vendee to recover the full amount of the consideration for the land, with interest.—O'MEARA v. MCDANIEL, Kan., 31 Pac. Rep. 303.

24. COVENANTS OF SEISIN—Breach.—Where land conveyed is described as being in a certain city, but by a prior change of the city limits is in fact in another town, and the grantor is seized thereof when the conveyance is made, and the land can be identified by the description in the deed, the covenant of seisin is not broken.—PERRY v. CLARK, Mass., 32 N. E. Rep. 226.

25. COVENANT OF WARRANTY — Action for Breach.—The action of covenant was in form and substance *ex contractu*, and an action under the Code by a covenantee for damages on account of the breach of a covenant of warranty after eviction under a paramount title is for a debt arising under a contract, which may be recovered by attachment.—CHENEY v. STRAUBE, Neb., 53 N. W. Rep. 479.

26. CREDITORS' BILL — Fraudulent Conveyances.— A grantee of property, conveyed by a debtor to defraud creditors, on accepting a conveyance, becomes a trustee for the creditor, and is directly liable for the value of the property so conveyed, where he actively participates in the fraud, and subsequently disposes of the property.—DOHERTY v. HOLIDAY, Ind., 32 N. E. Rep. 315.

27. CREDITORS' BILL—Fraudulent Conveyances.—In a suit in equity by a judgment creditor to subject to the lien of his judgment lands held by a third party in fraudulent trust for the judgment debtor, it is not competent for the trustee to question the judgment on any ground except that it was recovered by fraudulent collusion between the plaintiff and defendant therein.—MCCANLESS v. SMITH, N. J., 25 Atl. Rep. 211.

28. CRIMINAL EVIDENCE — Homicide — Res Gestæ.—Where a witness testified that on the night of the homicide he was in a house about 25 or 30 steps distant from the point where the deceased was shot, and that he heard the report of the gun, and cries of distress, it is not allowable for him to testify further that within a minute after the shooting another person ran into the house, and whispered to him that there was nothing to hurt him; that the accused had shot the deceased. The whispering indicated premeditation, rather than spontaneous exclamation, there being apparently nothing to call for lowering of the voice if the speaker was prompted by a natural impulse only. This excludes it from admissibility as a part of the *res gestæ*.—FUTCH v. STATE, Ga., 16 S. E. Rep. 102.

29. CRIMINAL EVIDENCE—Murder.—On a trial for one Freidrich for murder, counsel for the State asked witness if he heard deceased, "while he was asleep, mumbling with his hands, and saying 'Freidrich, don't;'" to which witness replied that he "did not remember particularly about that:" Held, that the admission of the evidence was prejudicial error.—STATE v. FREIDRICH, Wash., 31 Pac. Rep. 332.

30. CRIMINAL EVIDENCE— Murder—Threats.—Threats of violence by the deceased against the accused, though not communicated to the latter, are admissible as evidence where there is any doubt as to who began the encounter. They tend to show that it was the intention of the deceased at the time of the meeting to attack the accused, and hence tend to prove that the former brought on the conflict, and are relevant evidence. If all the evidence is to the effect that the defendant was the aggressor they are not admissible.—WILSON v. STATE, Fla., 11 South. Rep. 556.

31. CRIMINAL LAW — Assault with Intent to Kill.—Where on a trial for assault with intent to kill, the complaining witness testifies that, while he and his brother were scuffling over a revolver, the same was discharged, and, before witness could move, defendant shot him, a charge that the evidence of the State was to the effect that witness' revolver was not discharged until after defendant shot him is error.—MCBEAN v. STATE, Wis., 53 N. W. Rep. 497.

32. CRIMINAL LAW — Bond. — Where an appeal is taken from a judgment forfeiting a bond after the final adjournment of the court which rendered the judgment, the appeal will be dismissed.—STATE V. JACKSON, La., 11 South. Rep. 575.

33. CRIMINAL LAW—Carrying Weapons.—The mere fact that an unmarried son lives with his father on land owned by the father does not make the entire tract the premises of the son, within Mansf. Dig. § 1907, providing that the prohibition against carrying weapons shall not prevent any person from carrying any weapon on "his own premises."—LEMMONS V. STATE, Ark., 20 S. W. Rep. 404.

34. CRIMINAL LAW — Cheating and Swindling.— The offense of cheating and swindling may be committed by false representation of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property. — THOMAS V. STATE, Ga., 16 S. E. Rep 94.

35. CRIMINAL LAW—Forgery.—In a forged instrument, it is not necessary that there should be such resemblance to the signature forged as to mislead one acquainted therewith. It is sufficient if there be an intent to deceive and a possibility of deceiving another, who may not know the genuine signature. — STATE V. GRYDER, La., 11 South. Rep. 573.

36. CRIMINAL LAW—Instructions.—An instruction that "the defendant is presumed to be innocent until his guilt is established by legal evidence. You are the exclusive judges of the facts proved, and of the weight to be given to the testimony; and, in case you have a reasonable doubt as to the guilt of the defendant, you will give him the benefit of the doubt and acquit him," is proper.—GAINES V. STATE, Tex., 20 S. W. Rep. 397.

37. CRIMINAL LAW—Instructions.—It is the duty of the trial court to instruct the jury on the law applicable to the facts proven during the trial of a case, and a refusal to do so when asked will be error; but it is the settled practice in this State that, if a party wishes to avail himself on the omission of the court to charge the jury on any point in the case, he must ask the court to give the instruction desired; otherwise he will not be permitted to assign the omission as error.— BLOUNT V. STATE, Fla., 11 South. Rep. 547.

38. CRIMINAL LAW— Murder — Malice.— It is not erroneous to charge that "the premeditation which the law requires to constitute murder in the first degree need not be for any particular length of time; that it is sufficient if the premeditation was but for a moment, provided that the action of the slayer was the result of such premeditation." The use of the word "moment" does not imply less time than was necessary for deliberating upon the subject of killing, and forming a distinct design or determination to kill, of which the defendant was fully conscious before firing the fatal shot. The premeditation or deliberation need not be for any particular length of time, but it of course must be of sufficient duration to enable the slayer, under the circumstances of each case, to form a distinct and conscious intent to kill. — LOVETT V. STATE, Fla., 11 South. Rep. 550.

39. CRIMINAL LAW—Notice.—Notice in a criminal case to the attorney, who, by appointment of the judge of the city court of Macon, as solicitor *pro tem.*, represented the State upon the trial of the case in that court, of the sanction of a writ of *certiorari* to the superior court, and of the time and place of hearing, is not sufficient. The notice must be served upon the solicitor general of the circuit.—BUTTS V. STATE, Ga., 16 S. E. Rep. 96.

40. CRIMINAL LAW—Theft—Embezzlement.— Where a servant employed to haul his master's goods from the cars to the master's sheds takes the goods from the railroad company, and sells them before he delivers them to his master, he is guilty of embezzlement, and not theft.—CODY V. STATE, Tex., 20 S. W. Rep. 398.

41. CRIMINAL LAW — Vacation of Judgment— Resentence.—The petitioner, on pleading guilty to an information charging him with the crime of burglary, was sentenced to the State industrial school, as under the age of 18 years, and was committed under said judgment to said institution. Shortly thereafter, and during the same term, the court sentencing him vacated and set aside said judgment, on the ground of mistake as to the petitioner's age, and sentenced him again, on the same information and plea of guilty, to be imprisoned in the penitentiary for the term of four years: Held, that the court had no jurisdiction to vacate the original judgment, or to pronounce the second sentence, and that the last sentence was a nullity.—IN RE JONES, Neb., 53 N. W. Rep. 468.

42. CRIMINAL PRACTICE — Obscene and Vulgar Language.—The sounder and safer construction of section 4372 of the Code, which makes it a misdemeanor to use obscene and vulgar language in the presence of a female, is that the use of spoken words only is contemplated. But, if the section embraces written as well as spoken words, to render the writing or its contents admissible in evidence on the trial of the accused it is necessary that the indictment should allege that the words were written, and describe with reasonable certainty the instrument of writing which contained them.—STEVENSON V. STATE, Ga., 16 S. E. Rep. 95.

43. CRIMINAL TRIAL — Prisoner's Statement. — In making his statement to the jury, as provided for by statute, the prisoner not being sworn as a witness, nor subject to cross-examination, nor restricted by the rules of evidence, he cannot lay the foundation for introducing evidence in his favor that would otherwise be inadmissible. Hence uncommunicated threats will not be received unless they are relevant and competent unaided by the contents of the statement. — VAUGHN V. STATE, Ga., 16 S. E. Rep. 64.

44. CRIMINAL TRIAL—Setting Aside Verdict.—The absence of witnesses is no ground for setting aside a verdict when it does not appear that a continuance was asked on the ground of such absence, and it does appear that every reasonable facility for obtaining the presence of the witnesses was extended to counsel for the accused by the presiding judge.—PEASE V. STATE, Ga., 16 S. E. Rep. 113.

45. CRIMINAL TRIAL— Theft — Instructions. — An instruction on circumstantial evidence, that "all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main facts sought to be proved," is not erroneous, as depriving the jury of the right to consider facts "not necessary to the conclusion."—LOPEZ V. STATE, Tex., 20 S. W. Rep. 395.

46. Damages—Mental Suffering.—In an action against a railroad company for breach of contract for special train, damages connot be recovered merely for disappointment and mental suffering resulting from delay in departing to reach the bedside of a sick parent. —WILCOX V. RICHMOND & D. R. CO., U. S. C. C. of App., 52 Fed. Rep. 264.

47. DEATH BY WRONGFUL ACT.— In an action by a widow, as administratrix of her husband, for negligently causing his death, it is proper to allow her to testify that the deceased was at the time of his death her sole support.—PENNSYLVANIA CO. V. KEANE, Ill., 32 N. E. Rep. 260.

48. DEATH BY WRONGFUL ACT.—Under Rev. St. 1881, § 284, where decedent in his life-time recovered damages for a personal injury, his administrator cannot maintain an action for his death resulting from the same injury, though in the latter action the measure of damages would be different from those in the former, and would go exclusively to the widow and children.— HECHT V. OHIO & M. RY. CO., Ind., 32 N. E. Rep. 302.

49. DEED—Description.—Where the owner of land, in conveying a portion of it by deed, bounds that portion by a street laid down upon a city map, as though that street were then an existing highway, though in fact it is not opened as such, the grantee is entitled, as against the grantor and his assigns, to have the street kept

open to its full width.—WHITE v. TIDE WATER OIL CO., N. J., 25 Atl. Rep. 199.

50. DEED—Quitclaim—Covenant.—Where the terms of a deed of conveyance, taking the whole together, show that the instrument is in its essence a quitclaim title, and that the makers intended no warranty except as against themselves and their own acts, a failure of the title to two of the lots out of a great number covered by the conveyance, by reason of the existence of a previous outstanding better title, will be no breach of any implied covenant arising out of a recital of facts or out of the use of words of conveyance, no fraud or intentional misrepresentation being alleged. Nor will the failure of the vendees to get or to hold possession of such two lots, without any fraud or misconduct on the part of the vendors, constitute a defense to an action for the purchase money, or any part thereof.—MCDONOUGH v. MARTIN, Ga., 16 S. E. Rep. 59.

51. DOWER—Widow's Quarantine.—Under the second section of the dower act, the widow is not entitled to hold without paying rent until her dower is assigned a farm without any buildings upon it, belonging to her husband, and adjoining and used by him in connection with a farm belonging to the wife, upon which latter were the mansion house occupied by the husband and wife before and at his death.—MCKAIG v. MCKAIG, N. J., 25 Atl. Rep. 181.

52. EJECTMENT—Adverse Possession.—In ejectment, in West Virginia, it is immaterial whether the paper title of the plaintiff is good or not, when he has proved adverse possession and payment of taxes for 10 years, for this gives a perfect title under the State statute of limitation.—HACKETT v. MARMET CO., U. S. C. C. of App., 52 Fed. Rep. 268.

53. EJECTMENT—Sale of Land.—Where the right of way and the franchises of a railroad company are sold as an entirety by a receiver duly authorized, the company cannot maintain ejectment against the purchaser for a part only of such right of way, though there may have been fraud practiced by the purchaser at the sale.—NEW CASTLE N. RY. CO. v. NEW CASTLE & S. V. R. CO., Pa., 25 Atl. Rep. 173.

54. ELECTIONS—Certifying Nominations.—Sess. Laws 1891, § 13, provides that all certificates of nomination by a political convention for public offices which are in apparent conformity with the act shall be deemed valid, unless objection is filed thereto; that candidates shall be notified of such objections; and that the officer with whom the certificate is filed (in this case the secretary of State) shall pass on the objections, and his decisions shall be final, provided he shall decide the same within 48 hours from the filing thereof: Held, that the secretary of the State has power to pass only on mere formal matters relating to certificates, since it is not to be presumed that the legislature intended to confer on such officer the power to decide the political destiny of the State on such hearing.—PEOPLE v. DISTRICT COURT OF ARAPAHOE COUNTY, Colo., 31 Pac. Rep. 339.

55. ELECTIONS—Marked Ballots.—Laws 1890, ch. 262, § 35, as amended by Laws 1891, ch. 296, which renders void and of no effect a ballot on which, or on a paster affixed thereto, a writing or mark of any kind has been placed by the voter, or by any other person to his knowledge, with intent that such ballot shall afterward be identified as the one voted by him, condemns the ballot, not only if it was marked for identification by the voter himself, but also if with his knowledge or assent it was marked for identification by any other person; and the facts required to condemn may be proven by any competent evidence, even against the testimony of the voter or the person in complicity with him in placing the mark on the ballot.—PEOPLE v. BOARD OF SUP'RS OF DUTCHESS COUNTY, N. Y., 32 N. E. Rep. 242.

56. EMINENT DOMAIN.—Where liens exist on land condemned for public use, a court of equity has power to allow the party condemning the same to pay into court, for the benefit of the lienholders, the damages awarded the owner, though the act under which the condemnation proceedings are brought does not provide for such payment, and the lienholders are not parties thereto.—PHILADELPHIA & R. R. CO. v. PENNSYLVANIA S. V. R. CO., Pa., 25 Atl. Rep. 177.

57. EMINENT DOMAIN — Consequential Injuries. — Where a city excavated a street so negligently as to take away the support of an abutting lot causing the soil of such lot to slide into the street excavated, the injury is not merely consequential, but it is direct and the owner can recover damages from the city therefor, though the excavation took place before the adoption of the constitution of 1889, which provides (article 1, § 16) that no private property shall be taken "or damaged" for public use without just compensation.—PARKE v. CITY OF SEATTLE, Wash., 31 Pac. Rep. 310.

58. EMINENT DOMAIN — Damage to Property. — The word "damaged," in Const. 1889, art. 1, § 16, which provides that no private property shall be taken or damaged for public or private use without just compensation, has some further meaning than the word "taken" in the same section.—BROWN v. CITY OF SEATTLE, Wash., 31 Pac. Rep. 313.

59. EQUITABLE RELIEF AGAINST JUDGMENTS.—Plaintiff executed and indorsed in a foreign State notes upon which judgments were entered under warrants of attorney. To secure the notes he assigned a mortgage and other notes secured by it: Held, in a suit brought in the county in which the mortgagor resided against the payee and indorsee of the notes and his assignees, all of whom were non-residents and against the mortgagor, to cancel the judgments, and for other equitable relief, on the ground that the notes were given for a gaming consideration, that service on the mortgagor in person and on the nonresidents by an order of publication was insufficient to confer jurisdiction, the mortgagor being a mere stakeholder, and not a party in interest.—SMITH v. KAMMERER, Pa., 25 Atl. Rep. 165.

60. EXECUTORS—Limitation. — The fact that a note, fraudulently given in settlement of certain other notes, is set out in the executor's inventory of an estate, while the other notes are omitted, does not make the proceeds of such notes afterwards coming into his hands, new assets, within Pub. St. ch. 136, § 11, extending the time in such cases for suits against an estate, especially where an intention to rescind the settlement had been manifested by the testator in a suit for that purpose, and by the subsequent prosecution thereof by his executor.—GOULD v. CAMP, Mass., 32 N. E. Rep. 225.

61. EXECUTORS AND ADMINISTRATORS.—Adult heirs or legatees of an estate, who seek to repudiate a sale by the administrator on the ground that he was interested individually with the purchaser in making the purchase, must do so within a reasonable time. After long acquiescence, with knowledge of the transaction, the sale will be taken as fair and legal.—RUDOLPH v. UNDERWOOD, Ga., 16 S. E. Rep. 55.

62. FEDERAL OFFENSE—Conspiracy to Defraud United States.—On separate trial of one defendant, on an indictment against two for conspiring to defraud the United States by mailing a large quantity of old newspapers for the purpose of fraudulently increasing the weight of mail matter (transported over a railway post route during a period fixed by the postal authorities for weighing such mail matter, as a basis for ascertaining the additional compensation to be paid the railway company), thereby offending against Rev. St. § 5440, before the jury convict they must find the defendant guilty beyond any reasonable doubt; and this includes finding from the evidence (1) that the conspiracy charged existed (2) that the overt act charged was committed in furtherance of the conspiracy, and (3) that defendant was one of the conspirators.—UNITED STATES v. NEWTON, U. S. D. C. (Iowa), 52 Fed. Rep. 275.

63. FORCIBLE DETAINER—Pleading.—A complaint, in an action for unlawful detainer of land, which shows that the detention complained of was after the tenancy of defendant by sufferance had been terminated, is

sufficient to give the court jurisdiction without setting out the evidence by which such facts can be established.—MINARD v. BURTIS, Wis., 53 N. W. Rep. 509.

64. FRAUDS, STATUTE OF.—An agreement to form a partnership for the purpose of buying, improving, and selling land is not within the statute of frauds. Where, in pursuance of such agreement, land is bought, and title taken in the name of one of the partners, the payment therefore being made out of a loan secured by mortgage on the land, a resulting trust arises in favor of the partners.—SPEYER v. DESJARDINS, Ill., 32 N. E. Rep. 283.

65. FRAUDULENT CONVEYANCE.—A bill against a judgment creditor of an estate and the administrator of the same to set aside such judgment alleged that it was procured by fraud and collusion between the defendants, and that "the claim upon which the said judgment is based is founded upon fraud, and nothing but fraud," and contained all other allegations necessary to entitle plaintiff to relief. Defendants appeared, but refused to plead to the bill: Held, that a decree dismissing the bill for want of equity was not erroneous, since no facts were alleged from which the court could infer fraud.—MCMAHON v. ROONEY, Mich., 53 N. W. Rep. 539.

66. FRAUDULENT CONVEYANCES. — A voluntary conveyance in fraud of creditors may be set aside at the suit of a subsequent creditor, where he avers and proves that such conveyance was made for the purpose of defrauding subsequent, as well as existing, creditors.—PETREE v. BROTHERTON, Ind., 32 N. E. Rep. 300.

67. GUARANTY— Discharge.—A bank holding a guaranty of the collection of a note delayed from July 17th (when it became convinced that suit was necessary) until November 29th to sue the principal, and delayed from January 7th following to April 8th to move to strike out a frivolous answer in the suit: Held, in an action on the guaranty, that the delay was so great as to amount as matter of law to a discharge of the guarantor. — CHATHAM NAT. BANK OF NEW YORK v. PRATT, N. Y., 32 N. E. Rep. 236.

68. GUARDIAN— Sale of Lunatic's Land. — In the absence of any irregularity, fraud, mistake, or legal surprise, a private sale of a lunatic's land, by her guardian, under order of and confirmed by the court of chancery, will not be set aside merely because another person has made an offer for the land exceeding by 6 per cent. the price produced at the guardian's sale, which increased amount would not repay the purchasers for their outlay and damages in effecting the sale.—IN RE LEARY, N. J., 25 Atl. Rep. 197.

69. GUARDIAN'S ESTATE.—In a suit for an accounting with complainant's guardian, the executor of the guardian being made defendant because it was claimed that he had in his hands funds belonging to complainant, where the testimony shows that the guardian did not receive the money, but that he failed to do so through neglect of his duty as guardian, an amendment to the bill may be allowed seeking to charge the guardian's estate, and for an accounting on the ground of his neglect in the discharge of his duties.—DODSON v. MCKELVEY, Mich., 53 N. W. Rep. 517.

70. HIGHWAYS— Dedication.—To constitute a road a public highway at common law, there must be both a dedication and an acceptance, either express or implied. Unless otherwise provided by statute, a dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burden, nor confer any right, upon the public authorities, unless the road is accepted by them as a highway, though, if used by the public and treated by the public authorities as a highway, acceptance of the dedicaction may be implied.—CITY OF DENVER v. DENVER & S. F. RY. CO., Colo., 31 Pac. Rep. 338.

71 HUSBAND AND WIFE — Community Property. — Where a married man executes a contract for the sale of community land, and the purchaser does not know that the land is community property, or that the vendor is married at the time the contract is executed, he cannot, on discovering such facts, rescind the contract, and recover the purchase money paid, without first demanding a valid contract of the vendor.—COLCORD v. LEDDY, Wash., 31 Pac. Rep. 320.

72. IMMIGRATION—Contract Laborer.—Under due authority from the secretary of the treasury, granted either by general regulations or by special instructions in individual cases, pursuant to the act of October 19, 1888, the superintendent or inspector of immigration may, at any time within one year after his landing, take into custody, and return to the country from which he came, an alien emigrant arriving in violation of law, even though he may have been previously passed and allowed to land.—IN RE LIFIERI, U. S. D. C. (N. Y.), 52 Fed. Rep. 293.

73. INFANT—Contract— Ratification.—A person, while a minor, executed a note for part of the purchase price of land. After he attained his majority, he and the vendor agreed upon an arrangement by which the latter agreed to remit the accrued interest and the former promised to keep the land and pay the principal of the note: Held, that this amounted to an affirmance of the contract, at least to the extent of the amount promised to be paid.— HOULTON v. MANTEUFFEL, Minn., 53 N. W. Rep. 541.

74. INJUNCTION — Joint Tort Feasors. — Where the president and secretary of a natural gas company, with consent of only one director, and without authority, give a party permission to take gas from a well of the company free of charge, they, the consenting director, and the person to whom such consent was given, are joint wrong doers, and an injunction against taking the gas was properly granted as to all of them.—HENSHAW v. PEOPLE'S MUTUAL NATURAL GAS CO., Ind., 32 N. E. Rep. 318.

75. INJUNCTION—Levy of Execution.—Where an officer is about to levy on property claimed by plaintiff by virtue of an execution against a third person, plaintiff cannot obtain an injuction against such levy until he has, by giving the officer notice of his claim, afforded him an opportunity to abandon the levy.—HINKLE v. BALDWIN, Mich., 53 N. W. Rep. 534.

76. INJUNCTION—Municipal Corporation.—A creditor of a municipal corporation is not entitled to an injunction against the collection of his municipal taxes on the ground that the municipality is indebted to him, and has in its treasury a fund which could not legally be applied otherwise than by paying this debt, and which it refuses to pay until after the creditor discharges the claim against him for taxes.—CARTERSVILLE WATERWORKS CO. v. MAYOR ETC., OF CITY OF CARTERSVILLE, Ga., 16 S. E. Rep. 70.

77. INSURANCE— Contract.—A policy of insurance on property in B was issued from the "home office" of the company in Connecticut, but the policy declared that it should not be valid until countersigned by the authorized agent at B, which was in South Carolina: Held, that the delivery of the policy by the agent in behalf of the company in South Carolina, where the property insured was situated, constituted the contract of insurance, and, since the loss occured there, that was where the cause of action on the policy arose. — CURNOW v. PHOENIX INS. CO. OF HARTFORD, S. Car , 16 S. E. Rep. 132.

78. INSURANCE— Increased Risk.— Insurance of machinery under a policy conditioned to be void only in case the hazard is increased, or any of the products of petroleum of greater inflammability than kerosene are used or kept about the premises, effected at a time when coal is being used as fuel, is not affected by the substitution therefor of "reduced oil," shown to be of less inflammability than kerosene; but the only question is as to the method of using the oil, and whether the hazard is thereby increased.—PRESIDENT, ETC., OF GRAND RAPIDS HYDRAULIC CO. v. AMERICAN FIRE INS. CO., Mich., 53 N. W. Rep. 538.

79. INSURANCE—Notice to Agent.—Where it is shown, in an action to recover on an insurance policy for loss

by fire that the application was written by the clerk of defendant's local agents; that such agents held another risk on the same property, and plaintiff so informed the clerk when the application was made,—the company will not be relieved from liability because the clerk failed to incorporate a statement of such other risk in the application.—STEELE V. GERMAN INS. CO. OF FREEPORT, Mich., 53 N. W. Rep. 514.

80. INSURANCE—Pleading.—In an action on an insurance policy the assured alleged that defendant's agent undertook to fill in the application for him, and that, although he informed the agent that the property was mortgaged, the latter stated that it was unincumbered: Held, that a paragraph of the answer, merely alleging the existence of the mortgage, was demurrable, as it confessed the allegations of the complaint as to the filling up of the application without avoiding them.—BOWLES V. PHENIX INS. CO. OF BROOKLYN, Ind., 32 N. E. Rep. 319.

81. INTOXICATING LIQUORS — Unlawful Sales — Criminal Prosecution—Election by State between Sales.—In a prosecution for an unlawful sale of intoxicating liquor, in which testimony has been offered tending to show several sales, it is the duty of the court, upon the application of the defendant, to require the State to elect upon what particular sale about which testimony was given it will rely for a conviction; and the refusal of such an application is material error.—STATE V. LUND, Kan., 31 Pac. Rep. 309.

82. JUDICIAL SALE—Caveat Emptor.—It is a well-settled rule that the doctrine of *caveat emptor* applies to all judicial sales, subject to the qualifications that the purchaser is entitled to relief on the ground of after-discovered mistake in material facts or fraud, where he is free from negligence. He is bound to examine the title, and not rely upon statements made by the officer conducting the sale as to its conditions. If he buys without such examination, he does so at his peril, and must suffer the loss occasioned by his neglect.—NORTON V. TAYLOR, Neb., 53 N. W. Rep. 481.

83. JUDICIAL SALES — Fraud — Evidence.— A person wishing to purchase land at administrator's sale commits a fraud by hiring another not to bid against him. On discovery of the fraud after the sale has been consummated, the purchase money paid, and a conveyance executed, the sale will be set aside at the instance of the administrator.—BARNES V. MAYS, Ga., 16 S. E. Rep. 67.

84. JUDICIAL SALES—Validity.—In an action for divorce the judgment directed the sale of defendant's life estate in certain land levied on by plaintiff during the action to secure the payment of alimony and costs, and plaintiff became the purchaser, receiving a commissioner's deed, by which such life estate was conveyed to her: Held, that the fact that defendant had a larger estate in the land than for life merely did not render the judgment void, though it may have been erroneous, and that the title to the life estate acquired under the sale and commissioner's deed was valid as against defendant.—GIBBS V. DAVIS, Ky., 20 S. W. Rep. 385.

85. LANDLORD'S LIEN.—A mortgage executed by tenants to their landlord as security for a note for rent is merely cumulative of the landlord's lien, and is not to be substituted for it.—MERCHANTS' & PLANTERS' BANK V. MEYER, Ark., 20 S. W. Rep. 406.

86. LEASE—Option.—Where the owner of land leases it for a period of five years at a stipulated annual rental, and the contract of lease contains a stipulation that the renters shall have the right, at the expiration of the lease, to purchase the promises, if they shall so elect, at a fixed price, there is no completed sale, nor do the renters acquire any estate in the land beyond the leasehold interest until they have elected to accept the offer, and have paid or tendered the purchase price stipulated in the contract.—BEAS V. SHEFFIELD, Kan., 31 Pac. Rep. 306.

87. MASTER AND SERVANT—Incompetent Fellow-servants.—Knowledge by a chief train dispatcher of the incompetency of a station agent and telegraph operator employed by the same company, but without authority on the part of the dispatcher to hire or discharge such servants, cannot be imputed to the company.—REISER V. PENNSYLVANIA CO., Pa., 25 Atl. Rep. 175.

88. MASTER AND SERVANT—Negligence.—The duty of a master to disclose to his servant the dangerous character of the machinery to be used by him is not discharged by notifying a fellow-servant, who does not communicate the notice to the servant who is injured.—PULLMAN'S PALACE CAR CO. V. LAACK, Ill., 32 N. E. Rep. 285.

89. MASTER AND SERVANT—Negligence—Evidence.—In an action for personal injuries received by the falling of a scaffold it appeared that plaintiff was a carpenrer of considerable experience, and he, with several other workmen, including defendant's superintendent, constructed the scaffold, plaintiff doing the entire work upon the portion which fell, according to his own judgment; and that the lumber used was of the same quality as that used for like scaffolds on the buildings: Held, that the court should have directed a non-suit.—PEFFER V. CUTLER, Wis., 53 N. W. Rep. 598.

90. MECHANIC'S LIEN—Findings.—Where in an action to foreclose a mechanic's lien, tried before the court, the burden being on plaintiff to show that the statutory notice was given, the court specially finds certain evidentiary facts bearing on the question of notice, but makes no finding as to whether the notice was given, it is equivalent to a finding against plaintiff.— YOUNG V. BERGER, Ind., 32 N. E. Rep. 318.

91. MECHANIC'S LIENS — Kentucky Statutes. — Contractors supplying laborers and teams for the construction and repair of a railroad, being paid for the same by the day, and either party having the right to stop work at the end of any day, are not "laborers" or "employees" within the terms of Act Ky. March 20, 1876, which, among other things, gives a lien for work done and materials furnished in keeping a road a going concern, but must rely on the contractors' act of March 27, 1888, which gives a lien in favor of persons "furnishing labor or materials for the construction or improvement" of any railroad, canal, or other public improvement.—TOD V KENTUCKY UNION RY. CO., U. S. C. C. of App., 52 Fed. Rep. 241.

92. MECHANIC'S LIEN—Statement of Claim.—The assignor of the person holding the property is not a necessary party to an action to foreclose a mechanic's lien, under the rule that all persons interested in the subject-matter in controversy should be made parties, either plaintiff or defendant.—HARRINGTON V. MILLER, Wash., 31 Pac. Rep. 325.

93. MINING CLAIM.—One who asserts title to a mining claim under a location made by an alien and two citizens cannot defeat the claims of the alien's heirs on the ground that, under Rev. St. § 2319, an alien cannot be a locator; for mining rights constitute no exception to the general rule that the right to defeat a title on the ground of alienage is reserved to the government alone.—BILLINGS V. ASPEN MIN. & SMELTING CO., U. S. C. C. of App., 52 Fed. Rep. 250.

94. MORTGAGE—Parol Evidence.—A mortgage executed by defendant and his wife to plaintiff stated that it was given as collateral security to a note bearing even date therewith, executed by defendant to plaintiff: Held, that it was competent to prove by parol evidence, as showing the true character of the mortgage and for what purpose and consideration it was given, that the note described therein was really executed to a third person, and that the mortgage was taken by plaintiff as security for his indorsement of the note.—CUTLER V. STEELE, Mich., 53 N. W. Rep. 521.

95. MORTGAGES—Validity.—A mortgage properly executed and acknowledged, which recites a money consideration in a specified sum, and which contains an ordinary power of sale authorizing the mortgagee to sell on default in the payment of principal or interest, is not rendered void or nonenforceable by the fact that

the defeasance clause leaves blank the amount of the debt intended to be secured by the mortgage, but parol evidence is admissible to supply the defect in the defeasance clause.—BURNETT V. WRIGHT, N. Y., 32 N. E. Rep. 253.

96. MUNICIPAL CORPORATION—City Council—Compensation.—Where the charter of a city authorizes the city council to fix the compensation of its members, the council has the right, in the absence of an ordinance regulating the same to fix such amount, and order it paid, by ordinance, even where no fees or salary was attached to the office by statute or ordinance at the time of their election. — CITY OF TACOMA V. LILLIS, Wash., 31 Pac. Rep. 321.

97. MUNICIPAL CORPORATION — Condemnation for Street.—In condemnation proceedings for opening a street, evidence that there was a considerable population which would thereby secure a more direct route into the city; that he fire department would secure better facilities for protection against fire; that better communication with the school would be afforded children living in the vicinity; and that the opening would bring the people living beyond, five blocks nearer the center of the city—is sufficient to sustain the finding of a jury, who had viewed the premises, that a necessity for opening the street existed.—CITY OF DETROIT V. BRENNAN, Mich., 53 N. W. Rep. 525.

98. MUNICIPAL CORPORATIONS—Negligence.—In an action to recover damages resulting from defendant's alleged negligent construction of a bridge over a certain river, whereby plaintiff's land was flooded at times of a moderate rise in such river, plaintiff's uncontradicted evidence showed that, by reason of a pier built in the center of such bridge, the water, in times of a moderate rise, could not pass, but was dammed up, and thrown back on plaintiff's land; that the bridge could have been built without such center pier; and, in that case, all the water at such times could pass: Held, that plaintiff was entitled to recover.—KRUG V. BOROUGH OF ST. MARY'S, Pa., 25 Atl. Rep. 161.

99. MUNICIPAL CORPORATION—Special Assessment.—Under Rev. St. ch. 24, act. 9, § 19, which declares that a "special assessment ordinance must specify "the nature, character, locality and description of the improvement" for which the assessment is levied, an ordinance requiring a street to be paved, without stating the width of the payment is insufficient to sustain a special assessment.—GAGE V. CITY OF CHICAGO, Ill., 32 N. E. Rep. 264.

100. MUNICIPAL CORPORATION—Towns and Townships.—A town created under township organization, being merely an involuntary organization for governmental purposes, is not an "incoporated town," within the meaning of Rev. St. ch. 24, art. 11, § 5, which allows the formation of municipal corporations in territory which "is not included within the limits of any incorporated town, village, or city."—PEOPLE V. VILLAGE OF HARVEY, Ill., 32 N. E. Rep. 296.

101. NEGLIGENCE—Instructions.—It is proper, where the evidence justifies it, to modify an instruction in regard to the matter of contributory negligence by adding that if, through defendant's negligence, the injured person was placed in a position of peril, and confronted with sudden danger, then the law did not require of him the same degree of care and caution that it does of a person who has ample opportunities for the full exercise of his judgment.—DUNHAM TOWING & WRECKING CO. V. DANDELIN, Ill., 32 N. E. Rep. 258.

102. NEGOTIABLE INSTRUMENT—Limitations—Foreign Judgment.—Where it is admitted in an action in Michigan on a note executed in California, and barred on its face by the statute of limitations, that no payment has ever been made on such note, and it is not shown that the remedy is not barred in Michigan, plaintiff cannot recover.—HOWARD V. COON, Mich., 53 N. W. Rep. 513.

103. OFFICERS—Deputy Clerk—Power.—Where a person, at the time he administered an oath and took an affidavit, was and for a long time previous thereto had been openly and without objection performing the duties of the office of deputy clerk, his title to the office cannot be questioned for irregularity in the manner of his appointment in a collateral proceeding assailing the validity of such affidavit, but must be by a direct proceeding instituted for the purpose.—TOWER V. WELKER, Mich., 53 N. W. Rep. 527.

104. PARTNERSHIP— Evidence. — A partner whose account with the firm was somewhat overdrawn, and whose conduct in other respects was displeasing to the other partners, was asked to withdraw. From thence until his death—a number of years—no business relations existed between him and the firm. On one occasion he solicited a loan from one of the partners, but made no claim to any interest in the firm. A partner died also, and a settlement was effected without objection, and without regard to any such interest: Held, to have shown an acquiescence in the demand for withdrawal, and an abandonment of any interest.—MCCONOMY V. REED, Pa., 25 Atl. Rep. 176.

105. PARTNERSHIP — Special Partner. — A limited partnership consisted of one special partner and three general partners. The three general partners agreed in writing to conduct a similar business in a neighboring city. The special partner consented to the agreement, but disclaimed all responsibility therefor: Held, that he was not liable to a creditor of the new business who had notice of the agreement under which it was conducted.—FIRST NAT. BANK OF GALESBURG V. CLARK, Ill., 32 E. N. Rep. 255.

106. PARTNERSHIP—What Constitutes.—The lessees of land for oil development contracted with H and X that the latter should sink a well, the former to pay one eighth of the expenses and receive one fourth of the production, after deducting royalty: Held, that the contract did not constitute the lessees copartners of H and X, and they were not liable on a contract made by the latter for the construction of the well.—WALKER V. HATRY, Pa., 25 Atl. Rep. 172.

107. OVERCHARGE OF FREIGHT.—Payment of an overcharge of freight to a railroad company, although made without objection, is not a voluntary payment, since the shipper and the carrier do not stand on an equality.—LOUISVILLE, E. & ST. L. CONSOLIDATED R. CO. V. WILSON, Ind., 32 N. E. Rep. 311.

108. PLEADING — Written Instrument — Complaint.—Rev. St. 1881, § 362, requiring the original or a copy of any written instrument on which suit is brought to be filed with the pleading, is imperative, and a complaint which falsely recites that a copy has been filed is bad on demurrer.—BLACKWELL V. PENDERGAST, Ind., 32 N. E. Rep. 319.

109. POWER OF ATTORNEY.—A power of attorney, given by the owner of a half interest in certain land to the owner of the other half interest, provided that the attorney had "full power and authority to sell my interest when he sells his own" in the land described; "as full power and authority to sell said premises as I myself have; and do ratify and confirm all that he may lawfully do in the premises." The attorney lived in the State where the land was situated, while the grantor lived in another State. The attorney sold the lands, and executed a conveyance as such attorney in fact, and within a month visited the grantor of the power, reported the sale and turned over the proceeds, which were accepted by such grantor, who brought this suit on the notes received in consideration of the conveyance: Held, in such action, that the attorney was authorized to execute the conveyance.—DELANO V. JACOBY, Cal., 31 Pac. Rep. 290.

110. POWER OF ATTORNEY—Unauthorized Payment.—A power of attorney authorizing the payment by a savings bank to the attorney of a fund standing in the name of the principal as executor of a specified estate, and signed by him in his individual capacity only, does not empower the bank to pay the attorney another fund standing in the name of the principal as administrator of a different estate.—GEARNS V. BOWERY SAV. BANK, N. Y., 32 N. E. Rep. 249.

111. PRINCIPAL AND AGENT — Payment to Agent.—A mortgagor is warranted in paying the debt to the conveyancer who negotiated the loan, who had been authorized by the mortgagee to receive the interest, and had received it repeatedly, and who produced and surrendered the bond and mortgage when the mortgagor desired to pay them off, though he had in fact no authority to receive such payment, and though such bond and mortgage had been intrusted to him by the mortgagee for safe keeping only, wrapped up in a bundle with other papers, without informing him of the contents of the package, and without giving him any power of disposal over it.—LAWSON v. CARSON, N. J., 25 Atl. Rep. 191.

112. PRINCIPAL AND AGENT—Usury.—Where a principal empowers an agent to transact business with respect to which there is a well-defined and publicly known usage, the presumption is, in the absence of facts indicating a different intent, that such authority was conferred in contemplation of such usage, and persons dealing with such agent in good faith will not be bound by limitations upon such usual authority.—MILWAUKEE & W. INVESTMENT CO. v. JOHNSTON, Neb., 53 N. W. Rep. 475.

113. RAILROAD COMPANY—Contract—Right of Way.—Parties who have obligated themselves by contract to procure a right of way for a railroad at their own cost and expense, and who, for that purpose, have caused expropriation proceedings to be instituted by counsel employed by themselves, though necessarily in the name of the railway campany, are bound to make good to the company the amount of the judgment rendered against it in such proceedings for the value of the land and incident damages, as provided by Rev. St. § 1481. — ST. LOUIS S. W. R. CO. v. JACOBS, La., 11 South. Rep. 571.

114. REPLEVIN—Bond.—In replevin by a firm, a bond executed by the firm with one of the partners as surety is insufficient, the statute requiring security additional to the pecuniary responsibility of plaintiffs.—HOPKINS v. GREEN, Mich., 53 N. W. Rep. 537.

115. SPECIFIC PERFORMANCE — Statute of Frauds.—A statement in a receipt that the payment made is for the land bought "adjoining the McKebly land" is not a sufficient memorandum of the sale to comply with the statute of frauds, when there is a controversy between the parties, which can only be settled by verbal evidence, as to which one of two tracts, both answering the description, is meant; and specific performance of such agreement cannot be enforced.—JONES v. TYE, Ky., 20 S. W. Rep. 388.

116. SUBROGATION—Contract—Public Buildings.—One who furnishes materials for use by a contractor in repairing a courthouse for a county, merely upon the contractor's promise to pay, and in the absence of any statute or other agreement, is not entitled to subrogation to the rights of the contractor in a fund set apart by the county to pay for the repairs, although the contractor is insolvent.—RIGGIN v. HILLIARD, Ark., 20 S. W. Rep. 402.

117. TELEGRAPH COMPANIES — Message.— It is competent for the general assembly to require a telegraph company, under a penalty, to deliver a message within a reasonable time after its reception by the company at the office in this State from which the delivery is to be made, whether the message be sent from another office of the company in this State, or from one of its offices in another State.—WESTERN UNION TEL. CO. v. JAMES, Ga., 16 S. E. Rep. 83.

118. TRIAL—Damages— City Ordinance.—The reasonableness or unreasonableness of a city ordinance regulating the speed of a train upon a street is a question of law for the court to decide, and not for the jury, unless it depends, in the opinion of the court, on the existence of particular facts which are disputed. In this case it was error to charge that the reasonableness or unreasonableness of the ordinance was a question for the jury.—METROPOLITAN, ST. R. CO. v. JOHNSON, Ga., 16 S. E. Rep. 49.

119. TRIAL — Jurors — Qualification. — Hypothetical questions propounded to a juror, such as his opinion on the race problem, his belief in the superiority of the white race, that negroes ought to be tried by white jurors, are irrelevant, and the answer of the witnesses cannot affect his qualifications as a juror. The test of his qualifications in this particular is whether or not he has any prejudice against the defendant, and not whether he is prejudiced against his race on account of the belief he entertains of the superiority of his own race.—STATE v. CASEY, La., 11 South. Rep. 583.

120. TRUSTS—Validity of Conditions.—The firm of B & Son executed an assignment for the benefit of creditors, and afterwards the wife of B executed a trust deed of her separate property for benefit of such creditors of her husband's firm as should accept the assignment on certain conditions stated in the trust deed. Subsequently the assignment was set aside at the instance of the creditors who were to be benefited by the trust deed: Held that, since the assignment was an essential feature in the plan of the trust, when it was set aside the purposes of the trust failed and the title to the property intended to be conveyed revested in the grantor.—WITT v. CARROLL, S. Car., 16 S. E. Rep. 130.

121. WATERS—Surface Water—Measure of Damages.—In an action against a town for turning water from the highway upon the abutting land, the measure of damages is the actual damage done, and evidence as to the difference between the market value of the land before and after the injury is inadmissible. — ESHLEMAN v. TOWNSHIP OF MARTIC, Pa., 25 Atl. Rep. 178.

122. WILLS.—A bequest to testator's wife of the residue of testator's personal property, and the issues and profits of all his real estate, "for her maintenance so long as she shall live," and on her death the balance "remaining in her hands undisposed of" to specified persons, creates only a life estate in the wife, and not a fee though she is empowered to sell so much of the estate as in her judgment may be necessary for her support, and the gift over on her death is not void, as being limited on a fee.—BRADWAY v. HOLMES, N. J., 25 Atl. Rep. 196.

123. WILLS—Bequest—Income.—A testator bequeathed $1,000 each to certain of his grandchildren, payable to them when they should respectively attain majority, providing that in the mean time their respective fathers should hold the bequests in trusts, and apply the income therefrom "towards their education and support," in the discretion of the fathers: Held that, so long as the fathers adequately education and supported the legatees during their minority, the income was the father's property and might be alienated by them, subject to its liability for the educated and support of the children.—DIXON v. BENTLY, N. J., 25 Atl. Rep. 194.

124. WILLS—Construction.—Where the words "heirs of the body," occurred in a devise, accompanied by the words "share and share alike," or "equally," or "in equal parts," or kindred words, and also the words "their heirs, executors, administrators, and assigns," resort must be had to the statute of distributions for the parties who shall answer the description and take the devise, but the method of distribution is fixed by the devise to be *per capita*, and not *per stirpes*.—DUKES v. FAULK, S. Car., 16 S. E. Rep. 122.

125. WITNESS—Competency.—An agent for the custody and management of a fund is not incompetent to testify in behalf of his principal against an administrator, save as to transactions with the intestate which took place in dealings, or in alleged dealings, between the witness, as agent, and the intestate. If both parties admit or contend that the transaction under investigation involved no element of agency, but was one between the agent, acting for himself as principal, on the one hand, and the intestate as principal on the other, the agent is a competent witness, under the evidence act of 1889.—HIDELL v. FUNKHOUSER, Ga., 16 S. E. Rep. 79.

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